

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MEBRHATO TSEHAI,

CV F 05-127 AWI LJO P

Plaintiff,

v.

ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND (Doc. 1)

ADAMS, et. al.,

ORDER DIRECTING CLERK OF COURT TO
SEND PLAINTIFF BLANK FORM

Defendants.

Mebrhato Tsehai ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the instant action on January 31, 2005, naming Warden Derral G. Adams, R. Samms, M. Mulkern, J. Murillo, Muburger, Amaro and Sgt. D. Stohl as Defendants.

A. SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint, or portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984), *citing* Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *see also* Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

B. SUMMARY OF COMPLAINT

Plaintiff alleges that on May 9, 2003, Lt. R. Samms used excessive force against him while performing an illegal and unauthorized cell extraction. Plaintiff states that Lt. Samms approached his cell with Correctional Officers Murillo, Murberger, Amaro, and Sgt. Stohl and ordered him to cuff-up because Plaintiff was being moved downstairs. Plaintiff states that he refused and was again ordered to cuff up by Lt. Sam's. Lt Samms then ordered the booth officer to open the cell door and when Plaintiff again refused, he was sprayed with pepper spray, decontaminated and moved to another cell. Plaintiff states he was not warned that he was a threat to the security of the institution and thus, his rights were violated.

C. ANALYSIS

The use of excessive force by a prison official violates the eighth amendment. Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995 (1992). Determining whether there has been an eighth amendment violation turns upon " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " See id. at 6 (*quoting* Whitley v. Albers, 475 U.S. 312, 320-21, 106 S.Ct. 1078 (1986)).

To prevail on an excessive force claim, an inmate must show the official applied force "maliciously and sadistically" for the purpose of inflicting pain, rather than in a "good faith effort to maintain or restore discipline." Id. at 4-5, 7, 112 S.Ct. at 999. Such factors as the need for the application of the force, the relationship between the need for the application of force and the

1 amount of force used, and the extent of injury inflicted are relevant to the ultimate determination.
 2 Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078 (1986). An inmate, however, does not
 3 need to have suffered an injury to establish an Eighth Amendment violation. Hudson, 503 U.S.
 4 at 7.

5 The Supreme Court has further held that not “every malevolent touch by a prison guard
 6 gives rise to a federal cause of action. Id. at 9. “Not every push or shove, even if it may later
 7 seem unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional rights.”
 8 Id. (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973) (*cert. denied sub nom.*
 9 Johnson, 414 U.S. 1033 (1973))). “The Eighth Amendment’s prohibition of ‘cruel and unusual’
 10 punishments necessarily excludes from constitutional recognition de minimis uses of physical
 11 force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”
 12 Id. at 9-10.

13 Plaintiff’s allegation that he was pepper sprayed by Defendant Samms is conclusory and
 14 thus, insufficient to support a an Eighth Amendment claim. Moreover, Plaintiff concedes that
 15 the spraying of him was due to his refusal to cuff-up so that he could be escorted to another part
 16 of the institution. Thus, Plaintiff fails to state a claim for relief under the Eighth Amendment.

17 Plaintiff also fails to allege any facts to support an Eighth Amendment claim against
 18 Defendant Correctional Officers Murillo, Murberger, Amaro, Sgt. Stohl and the Four John Doe
 19 Defendants. The Civil Rights Act under which this action was filed provides:

20 Every person who, under color of [state law] . . . subjects, or causes
 21 to be subjected, any citizen of the United States . . . to the
 22 deprivation of any rights, privileges, or immunities secured by the
 23 Constitution . . . shall be liable to the party injured in an action at
 24 law, suit in equity, or other proper proceeding for redress.

25 42 U.S.C. § 1983. The statute plainly requires that there be an actual connection or link between
 26 the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
 27 Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
 28 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a
 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates

1 in another's affirmative acts or omits to perform an act which he is legally required to do that
2 causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th
3 Cir. 1978). In order to state a claim for relief under section 1983, plaintiff must link each named
4 defendant with some affirmative act or omission that demonstrates a violation of plaintiff's
5 federal rights.

6 With regard to Defendant Warden Adams, Plaintiff is informed that supervisory
7 personnel are generally not liable under Section 1983 for the actions of their employees under a
8 theory of respondeat superior and, therefore, when a named defendant holds a supervisory
9 position, the causal link between him and the claimed constitutional violation must be
10 specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld,
11 589 F.2d 438, 441 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). To state a claim for relief
12 under Section 1983 based on a theory of supervisory liability, Plaintiff must allege some facts
13 that would support a claim that supervisory Defendants either: personally participated in the
14 alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent
15 them; or promulgated or "implemented a policy so deficient that the policy 'itself is a repudiation
16 of constitutional rights' and is 'the moving force of the constitutional violation.'" Hansen v.
17 Black, 885 F.2d 642, 646 (9th Cir. 1989) (*internal citations omitted*); Taylor v. List, 880 F.2d
18 1040, 1045 (9th Cir. 1989). Although federal pleading standards are broad, some facts must be
19 alleged to support claims under section 1983. See Leatherman v. Tarrant County Narcotics Unit,
20 507 U.S. 163, 168 (1993).

21 Plaintiff has not alleged any facts indicating that Defendants personally participated in the
22 alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent
23 them; or promulgated or "implemented a policy so deficient that the policy 'itself is a repudiation
24 of constitutional rights' and is 'the moving force of the constitutional violation.'" Hansen v.
25 Black at 646.

26 Although Plaintiff does not allege facts concerning the loss of time credits, he seeks the
27 restoration of credits in his prayer for relief. Where, as here, "success in a . . . [section] 1983
28 damages action would implicitly question the validity of conviction or duration of sentence, the

litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.” Muhammad v. Close, 540 U.S. 749, 751, 124 S.Ct. 1303, 1304 (2004) (*citing* Heck v. Humphrey, 512 U.S. 477 (1994)); Edwards v. Balisok, 520 U.S. 641, 648 (1997) (applying Heck to a prison disciplinary hearing where good-time credits were affected). Because the punishment imposed at the disciplinary hearing affects the duration of Plaintiff’s sentence, Plaintiff’s due process claim is barred until such time as Plaintiff invalidates the result of the disciplinary hearing.

D. CONCLUSION

The Court finds that Plaintiff’s complaint does not contain any claims upon which relief can be granted under § 1983 against any of the Defendants. The Court will provide Plaintiff with time to file an Amended Complaint curing the deficiencies identified above should he wish to do so.

Plaintiff must demonstrate in the Amended Complaint how the conditions complained of resulted in a deprivation of his constitutional rights. See, Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The Amended Complaint must specifically state how each Defendant is involved. Further, there can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant’s actions and the claimed deprivation. Rizzo v. Goode, 423, U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Finally, Plaintiff is advised that Local Rule 15-220 requires that an Amended Complaint be complete in itself without reference to any prior pleading. As a general rule, an Amended Complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once an Amended Complaint is filed, the original Complaint no longer serves any function in the case. Therefore, in an Amended Complaint, as in an original Complaint, each claim and the involvement of each defendant must be sufficiently alleged. The Amended Complaint should be clearly and boldly titled “AMENDED COMPLAINT,” reference the appropriate case number, and be an original signed under penalty of perjury.

Plaintiff is also informed that it is inappropriate to attach exhibits to a complaint. See

Rule 8, Federal Rules of Civil Procedure. Further, the Court cannot serve as a repository for the parties' evidence. Originals or copies of evidence (i.e., prison or medical records, witness affidavits, etc.) should not be submitted until the course of litigation brings the evidence into question (for example, on a motion for summary judgment, at trial, or when requested by the court). At this point, the submission of evidence is premature as the Plaintiff is only required to state a prima facie claim for relief.

E. ORDER

The Court HEREBY ORDERS:

1. The Clerk of Court is DIRECTED to SEND Plaintiff a blank civil rights complaint form;
2. The Complaint is DISMISSED with leave to amend. WITHIN THIRTY (30) days from the date of service of this order, Plaintiff SHALL:
 - a. File an Amended Complaint curing the deficiencies identified by the Court in this Order, or
 - b. Notify the Court in writing that he does not wish to file an Amended Complaint and pursue the action but instead wishes to voluntarily dismiss the case.

Plaintiff is forewarned that his failure to comply with this Order may result in a Recommendation that the Complaint be dismissed pursuant to Local Rule 11-110.

IT IS SO ORDERED.

Dated: July 24, 2006
b9ed48

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE